Ann Joo Integrated Steel Sdn Bhd v Pemungut Duti Setem

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO WA-24–21–04 OF 2021
NOORIN BADARUDDIN J
4 OCTOBER 2022

Revenue Law — Stamp duty — Assessment — Whether letter of offer for credit executed between plaintiff and bank fell within Stamp Duty (Remission) (No 2) Order 2012 — Whether letter of offer fell under sub-item 22(1)(b) of First Schedule of Stamp Act 1949 — Whether letter of offer qualified for remission of stamp duty under Stamp Duty (Remission) (No 2) Order 2012 and ought to be stamped at the rate of zero point one per cent — Stamp Act 1949 ss 39(1), (2) & sub-item 22(1)(b) of First Schedule — Stamp Duty (Remission) (No 2) Order 2012 para 2

Statutory Interpretation — Taxing statute — Strict construction — Interpretation of para 2 of Stamp Duty (Remission) (No 2) Order 2012 — Whether Stamp Duty (Remission) (No 2) Order 2012 ought to be given plain and ordinary meaning — Whether taxing statue ought to be given strict interpretation — Stamp Duty (Remission) (No 2) Order 2012 para 2

This was a stamp duty appeal under s 39(1) of the Stamp Act 1949 ('the Act') by way of a case stated pursuant to s 39(2) of the Act. In the present case, the plaintiff was informed by the Collector of Stamp Duties ('the defendant') that the letter of offer for credit ('the LO') executed between the plaintiff and Alliance Bank Malaysia Bhd ('the bank') was not qualified for remission of stamp duty under the Stamp Duty (Remission) (No 2) Order 2012 ('the Remission Order'). Subsequently, the defendant issued the Notice of Stamp Duty Assessment dated 13 February 2019 ('the assessment') to the plaintiff. Aggrieved by the decision, the plaintiff filed the present appeal for a declaration that the assessment was erroneous, null and void. The issue for the court's determination was whether the LO fell within the Remission Order.

Held, allowing the appeal with costs:

(1) There was no ambiguity in the Remission Order. The wordings in para 2 of the Remission Order were plain and clear. It was applicable to a loan agreement or loan instrument which was chargeable under sub-item 22(1)(b) of the First Schedule of the Act, had no security whatsoever and was either repayable on demand or in a single bullet repayment. The defendant ought to give the Remission Order its plain and ordinary meaning as it was a trite law that strict interpretation of

taxing statutes must be given. The LO as well as the Remission Order were clear and there was no room for the court to re-write and change the meaning of the LO and the Remission Order which were clear and unambiguous. There was no scope for the court to innovate or take upon itself the task of amending or altering statutory provisions or any clear contract or agreement. The defendant had no legal or factual basis in contending that the LO was subject to sub-item 22(1)(a) of the First Schedule of the Act (see paras 19 & 21–22).

(2) The court found that there was in fact no definite or certain period of time prescribed under the LO for the credit facilities given to the plaintiff. The LO, therefore, fell under sub-item 22(1)(b) of the First Schedule of the Act qualifying for remission of stamp duty under the Remission Order and ought to be stamped at the rate of zero point one per cent. On a plain reading of para 2 of the Remission Order, the plaintiff had fulfilled all the requirements stipulated thereunder where the LO clearly stated that security was on clean basis ie, without any security and that the bank reserves the right to recall/cancel the facility or any part thereof at any time it seems fit without assigning any reason by giving written notice of the same, whereupon the facility of such part thereof shall be cancelled and the whole indebtedness or such part thereof be repayable on demand (see paras 15 & 23–24).

[Bahasa Malaysia summary

Ini adalah rayuan duti setem di bawah s 39(1) Akta Setem 1949 ('Akta tersebut') melalui kes dinyatakan menurut s 39(2) Akta tersebut. Dalam kes ini, plaintif telah dimaklumkan oleh Pemungut Duti Setem ('defendan') bahawa surat tawaran untuk kredit ('ST') yang disempurnakan antara plaintif dan Alliance Bank Malaysia Bhd ('bank tersebut') adalah tidak layak untuk peremitan duti setem di bawah Perintah Duti Setem (Peremitan) (No 2) 2012 ('Perintah Peremitan tersebut'). Selepas itu, defendan mengeluarkan Notis Penilaian Duti Setem bertarikh 13 Februari 2019 ('penilaian tersebut') kepada plaintif. Terkilan dengan keputusan tersebut, plaintif memfailkan rayuan semasa untuk pengisytiharan bahawa penilaian tersebut adalah salah, batal dan tidak sah. Isu untuk penentuan mahkamah adalah sama ada ST tersebut termasuk dalam Perintah Peremitan tersebut.

Diputuskan, membenarkan rayuan dengan kos:

(1) Tiada kekaburan dalam Perintah Peremitan tersebut. Perkataan dalam perenggan 2 Perintah Peremitan tersebut adalah terang dan jelas. Ia terpakai kepada perjanjian pinjaman atau instrumen pinjaman yang boleh dicaj di bawah sub-item 22(1)(b) Jadual Pertama Akta tersebut, yang tidak mempunyai apa-apa jaminan dan perlu dibayar balik sama ada atas permintaan atau sekaligus. Defendan sepatutnya memberikan Perintah Peremitan tersebut maksudnya yang jelas dan biasa kerana telah

menjadi undang-undang yang mantap bahawa tafsiran ketat statut cukai mesti diberikan. Surat tawaran tersebut serta Perintah Peremitan tersebut adalah jelas dan tiada ruang untuk mahkamah menulis semula dan mengubah maksud ST tersebut dan Perintah Peremitan tersebut yang jelas dan tidak kabur. Tiada skop untuk mahkamah membuat inovasi atau mengambil alih tugas meminda atau mengubah peruntukan berkanun atau mana-mana kontrak atau perjanjian yang jelas. Defendan tidak mempunyai asas undang-undang atau fakta dalam berhujah bahawa ST tersebut tertakluk kepada sub-item 22(1)(a) Jadual Pertama Akta tersebut (lihat perenggan 19 & 21–22).

(2) Mahkamah mendapati sebenarnya tiada tempoh masa yang tetap atau tertentu yang ditetapkan di bawah ST tersebut bagi kemudahan kredit yang diberikan kepada plaintif. Oleh itu, ST tersebut termasuk di bawah sub-item 22(1)(b) Jadual Pertama Akta tersebut yang layak untuk peremitan duti setem di bawah Perintah Peremitan tersebut dan sepatutnya disetem pada kadar kosong perpuluhan satu peratus. Pada bacaan biasa perenggan 2 Perintah Peremitan tersebut, plaintif telah memenuhi semua keperluan yang ditetapkan di bawahnya di mana ST tersebut dengan jelas menyatakan bahawa sekuriti adalah atas dasar bersih iaitu, tanpa apa-apa sekuriti dan pihak bank berhak untuk menarik semula/membatalkan kemudahan tersebut atau mana-mana bahagiannya pada bila-bila masa ia difikirkan sesuai tanpa memberikan apa-apa sebab dengan memberikan notis bertulis mengenainya, yang mana bahagian kemudahan tersebut hendaklah dibatalkan dan keseluruhan keterhutangan atau bahagian tersebut perlu dibayar balik apabila diminta (lihat perenggan 15 & 23–24).]

Cases referred to

National Land Finance Co-operative Society Ltd v Director General of Inland Revenue [1994] 1 MLJ 99; [1993] 4 CLJ 339, SC (refd)

United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd and another appeal [1991] 2 MLJ 559; [1991] 1 CLJ Rep 474, SC (refd)

Legislation referred to

Finance Act 2018

Stamp Act 1949 ss 38A, 38A(7), 39(1), (2), First Schedule, item 22(1)(a), (1)(b)

Stamp Duty (Remission) (No 2) Order 2012 para 2

S Saravana Kumar (with Nur Hanina bt Mohd Azham and Yap Wen Hui) (Rosli Dahlan Saravana Partnership) for the plaintiff.

Normareza bt Mat Rejab (with Syazana Safiah bt Rozman) (Revenue Counsel, Inland Revenue Board of Malaysia) for the defendant.

Noorin Badaruddin J:

[1] This is a stamp duty appeal under s 39(1) of the Stamp Act 1949 ('the Act') made by way of a case stated pursuant to s 39(2) of the Act. The plaintiff is seeking for inter alia a declaration that the Notice of Stamp Duty Assessment dated 13 February 2019 issued by the defendant ('the assessment') is erroneous, null and void.

[2] Pursuant to s 39(1) of the Act, the opinion of this court is sought on whether the letter of offer dated 27 December 2018 executed between Alliance Bank Malaysia Bhd and the plaintiff falls within the Stamp Duty (Remission) (No 2) Order 2012 ('the Remission Order').

BRIEF FACTS

[3] On 27 December 2013, the plaintiff accepted a letter of offer for credit ('letter of offer') from Alliance Bank ('the bank') amounting to RM105m.

[4] On 31 January 2019, upon submission of the letter of offer to the defendant, the plaintiff was informed by the defendant that the letter of offer is not qualified for remission of stamp duty under the remission order.

[5] On 13 February 2019, the plaintiff received the Notice of Stamp Duty Assessment dated 13 February 2019 issued by the defendant.

[6] On 14 February 2019, the plaintiff proceeded to make stamp duty payment under protest in accordance with s 38A(7) of the Act vide letters dated 14 February 2019 and 11 February 2019.

[7] On 28 February 2019, the plaintiff through its' previous solicitors filed a notice of objection against the assessment pursuant to s 38A of the Act.

THE PLAINTIFFS CONTENTIONS

[8] The plaintiff takes the position that the letter of offer clearly states that the loan instrument has no security whatsoever and must be repayable on demand or in a single bullet payment. Therefore, the letter of offer falls squarely within para 2 of the Order which qualifies for remission of stamp duty in excess of 0.1%.

[9] It is contended that the correct approach to be adopted in interpreting a taxing statute is that it should be given a strict interpretation, by giving their plain, natural and ordinary meaning and no intendment can be made in favour of tax liability.

A THE DEFENDANT'S CONTENTIONS

[10] Summarily, the defendant takes the position that there is no error in the assessment and the letter of offer was correctly charged to stamp duty under item 22(1)(a) of the First Schedule of the Act and the Remission Order is therefore not applicable to the letter of offer. It is contended that the letter of offer does not spell out the sums of money must be paid by way of demand or single bullet payment and is therefore liable to stamp duty as a loan agreement or loan instrument under item 22(1)(a) of the First Schedule of the Act.

C FINDINGS

[11] Sub-item 22(1) of the First Schedule of the Act upon being amended by the Finance Act 2018, states the following:

> BOND, COVENANT, LOAN, SERVICES, EQUIPMENT LEASE AGREEMENT OR INSTRUMENT of any kind whatsoever:
>
> (1) Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or for any sum or sums of money at stated periods, not being interest for any sum secured by a duly stamped instrument, nor rent reserved by a lease or tack —
>
> (a) *for a definite and certain period so that the total amount to be ultimately payable can be ascertained;*
>
> (b) *for the term of life or any other indefinite period* — for every RM100 and also for any fractional part ofRM100 of the annuity or sum periodically payable. (Emphasis added.)

[12] It is apparent that the material difference between sub-items 22(1)(a) and 22(1)(b) of the First Schedule to the Act is that the former would apply to bond, covenant or instrument for a definite and certain period of time so that the total amount to be ultimately payable can be ascertained. On the other hand, sub-item 22(1)(b) of the First Schedule of the Act applies where the bond, covenant or instrument are for the term of life or any other indefinite period.

[13] Upon perusal of the letter of offer, this court finds that the availability of the facility is subject to the bank's right to recall/cancel the facility or any part thereof at any time the bank deems fit whereupon the facility of such part thereof shall be cancelled and the whole indebtedness or such part thereof be repayable on demand. The specific condition for repayment is stated in the letter of offer as follows:

> SPECIFIC CONDITIONS FOR TF
>
> i) Repayment

> Notwithstanding any other provisions herein stated related to the availability of the Facility or any part thereof, the Bank reserves the right to recall/cancel the facility or any part thereof *at any* time it deems fit without assigning any reason thereto by giving written notice of the same, whereupon the facility of such part thereof shall be cancelled and the whole indebtedness or such part thereof be repayable on demand.
>
> ...
>
> 2. Forward Foreign Exchange ('Forex') Specific Condition: Repayment
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> Notwithstanding any other provisions herein stated related to the availability of the Facility or any part thereof, the Bank reserves the right to recall/cancel the facility or any part thereof at any time it deems fit without assigning any reason thereto by giving written notice of the same, whereupon the facility of such part thereof shall be cancelled and the whole indebtedness or such part thereof be repayable on demand. (Emphasis added.)

[14] The defendant contends that the letter of offer does not spell out the sums of money to be paid must be by way of demand or single bullet repayment. It is further contended that the specific condition for Trade Facilities under item (i) 'Repayment' only deals with the situation when the Trade Facilities are recalled or cancelled by the bank. According to the defendant if such situation occurs, the plaintiff will have to pay the sums of money expended under the Trade Facilities upon demand by the bank. It is argued that the specific condition for Forward Foreign Exchange ('Forex') under item 'Repayment' only deals with the situation when the Forex is recalled or cancelled by the bank. If such situation occurs, the plaintiff will have to pay the sums of money expended under the Forex upon demand by the bank. According to the defendant, there is no specific provision on how repayment of the loan is to be made in the ordinary course ie if the Trade Facilities or Forex is not recalled or cancelled by the bank and that in any event it must be clearly shown that under the letter of offer, the mode of repayment of the loan is either upon demand or single bullet repayment.

[15] This court finds that there is in fact no definite or certain period of time prescribed under the letter of offer for the credit facilities given to the plaintiff. The letter of offer therefore, falls under sub-subitem 22(1)(b) First Schedule of the Act qualifying for remission of stamp duty under the Remission Order.

[16] Paragraph 2 of the Remission Order states that:

> The amount of stamp duty that is chargeable under subsubitem 22(1)(b) of the First Schedule to the Act upon a loan agreement or loan instrument without security for any sum or sums of money repayable on demand or in single bullet payment under that subsubitem which is in excess of zero point one per cent (0.1%) is remitted.

[17] There is no specific requirement under the Remission Order for the sums of money to be paid under the letter of offer to be by way of demand or single bullet repayment in the ordinary course. The letter of offer clearly states that the security is on clean basis:

> SECURITY/SUPPORT
>
> On clean basis.

[18] It can therefore be understood that there is in fact no security and the bank reserves the right to recall/cancel the facility or any part thereof at any time it seems fit without assigning any reason by giving written notice of the same, whereupon the facility of such part thereof shall be cancel and the whole indebtedness or such part thereof be repayable on demand.

[19] There is no ambiguity in the Remission Order. The wordings in Paragraph 2 of the Remission Order is plain and clear. It is applicable to a loan agreement or loan instrument which is chargeable under sub-item 22(1)(b) of the First Schedule of the Act, has no security whatsoever and is either repayable on demand or in a single bullet repayment.

[20] In *United Malayan Banking Corp Bhd v Pekeliling Triangle Sdn Bhd and another appeal* [1991] 2 MLJ 559; [1991] 1 CLJ Rep 474, the Supreme Court had laid down the rules of construction of documents for stamp duty purposes and of stamp duty legislation which was well summarised in the following passages from *Sergeant and Sims on Stamps Duties* (9th Ed) at p 18:

> (a) General rule of construction of charge
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> It is a well-settled rule of law that every charge upon the subject must be imposed by clear and unambiguous language, *Denn & Manifold v Diamond* [1825] 4 B & C 243, and a statute imposing a tax upon the subject should always receive a strict interpretation and should not be allowed to operate as a charge unless the words are plain and unambiguous, *Daines v Heath* [1847] 3 CB 938. The party who seeks to bring an instrument within the Stamp Act must show clearly that it falls within it, and no intendment can be made in favour of the liability, *Phillips v Morrison* [1844] 13 LJ Ex 212, and see *R v Winstanley* [1831] 1 Cr&J 434.
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> (b) Ambiguity
>
> If the statute is so indefinite and uncertain that it can be treated in two ways and the true construction of it is open to two views, one more favourable to the Crown and the other to the subject, then the latter construction should be adopted, *Clifford v IRC* [1896] 2 QB 187, approved and followed in *Hennell v IRC* [1933] 1 KB 415 CA. In other words, the subject, and not the Crown, is entitled to the benefit of the doubt *R v Winstanley*, supra.

[21] The defendant ought to give the Remission Order its plain and ordinary meaning as it is trite law that strict interpretation of taxing statutes must be

given. In *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [1994] 1 MLJ 99; [1993] 4 CLJ 339 the Supreme Court had held that:

> ... in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used ...

[22] It is the finding of this court that the letter of offer as well as the Remission Order are clear and there is no room for this court to re-write and change the meaning of the letter of offer and the Remission Order which are clear and unambiguous. There is no scope for the court to innovate or take upon itself the task of amending or altering statutory provisions or any clear contract or agreement. It is of the considered view that the defendant has no legal or factual basis in contending the letter of offer is subject to sub-item 22(1)(a), First Schedule of the Act.

[23] The letter of offer falls under the scope of sub-item 22(1)(b) of the First Schedule to the Act. On a plain reading of para 2 of the Remission Order, the plaintiff has fulfilled all the requirements stipulated thereunder where the letter of offer clearly states that security is on clean basis ie without any security and that the bank reserves the right to recall/cancel the facility or any part thereof at any time it seems fit without assigning any reason by giving written notice of the same, whereupon the facility of such part thereof shall be cancelled and the whole indebtedness or such part thereof be repayable on demand.

CONCLUSION

[24] Premised on the reasons above, this court finds that the letter of offer qualifies for remission of stamp duty under the Remission Order. The letter of offer falls squarely within the Remission Order and ought to be stamped at the rate of zero point one per cent (0.1%).

[25] The plaintiff's appeal was therefore allowed with costs.

Appeal allowed with costs.

Reported by Dzulqarnain Ab Fatar